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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1552

FORD MOTOR COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION OF THE UNITED STATES TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (App. 119–127)[1] holding that appellant, the Ford Motor Company ("Ford"), violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring certain assets from the Electric Autolite Company ("Electric Autolite"). The assets included, *inter alia*, the nationally recognized "Autolite" trade name, Electric Autolite's only spark

[1] "App." refers to the Appendix to the Jurisdictional Statement.

plug plant in the United States, a battery plant, and its nationwide distribution organization for spark plugs and batteries. The appeal is limited to that portion of the judgment relating to spark plugs, which orders Ford to dispose of its interest in the "Autolite" name and in the spark plug plant and subjects it to certain injunctive provisions relating to the manufacture and purchase of spark plugs.

1. THE INDUSTRY AND THE ACQUISITION

Ford is engaged primarily in the manufacture, assembly and sale of automobiles and related parts and accessories. For 1960, Ford's sales exceeded $5¼ billion, and its assets exceeded $3¾ billion (Ford Ans., par. 6). In 1965, these figures had doubled, and Ford ranked second and third in sales and assets among industrial corporations in this country (G–137).[2]

Over the years Ford has been the second leading producer of automobiles. It alone accounts for more than a fourth of the entire industry output. The total production of it, General Motors and Chrysler constitutes well in excess of 90 percent of that output (G–140).

A highly integrated manufacturer, Ford makes all or a substantial portion of many of its requirements. Prior to the acquisition, however, it did not make

[2] "G" denotes a government exhibit; "F", a Ford exhibit; "GF", a stipulated exhibit; "FR", a Ford exhibit in the hearing on relief; and "Tr." and "R. Tr.", respectively, the transcripts of the trial on the merits and on relief.

spark plugs or batteries.[2] It purchased these parts from independent companies—that is, companies not owned by an automobile manufacturer. (G–113, 122; App. 28.)

Ford sold automotive parts and accessories, largely through its franchised dealers, in the automobile repair and replacement market, often referred to as the "aftermarket." These items included those it manufactured itself, such as ignition parts, as well as those it purchased from independents, such as spark plugs and batteries. Independents, some of whom supplied parts to automobile manufacturers for original installation as well as for the replacement market, also sold parts to the replacement market through other channels. (GF–1, pars. 1, 12, 20; App. 28–29.)

For a number of years, Ford actively investigated increasing its penetration of the replacement market. A study it made revealed a steady pattern of growth in that market, and indicated that at the beginning of the 1960s sales amounted to about $3.5 billion a year (G–14). Ford's share of that market, however, had not kept pace with its share of the total car market (*ibid.*). Sales to the aftermarket through its franchised dealers had declined substantially (G–14). Car owners had shifted their tune-up and minor repair business from the franchised dealers to service stations, independent garages and other retail outlets (G–8, GF–1, pars. 17–19). The franchised dealers were not an effective source of supply for this business, since the major channels of distribution to these out-

[2] Ford had manufactured batteries for a brief period in the 1920s.

lets were independent warehouse distributors and jobbers (G–8). Moreover, unlike franchised dealers, these repair outlets were oriented to servicing all makes of cars. Thus a car manufacturer seeking to increase its share of the replacement market had to offer parts applicable to all makes of cars, not just its own models as Ford had been doing through its dealers (GF–1, par. 19).

Based on its studies, Ford management concluded that effective participation in the aftermarket required the following: (1) a full line of high volume service parts which fit competitive makes as well as Ford makes; (2) an established nationwide distribution organization oriented toward this market; and (3) a nationally recognized brand name (G–14). Management decided that spark plugs and batteries satisfied the first requirement, since they are high volume service items required in a full line of parts applicable to all makes of cars (*ibid.*). Ford made a preliminary study exploring the prospects of itself manufacturing spark plugs and batteries, which it had the resources to do (G–3; App. 60–61, 89). But this exploration had not matured sufficiently for submission to top management (App. 60–63, 89–93), when it was interrupted by negotiations for the Electric Autolite acquisition (App. 89–93).

At about the same time that Ford was investigating ways of increasing its aftermarket penetration, Electric Autolite considered disposing of certain of its assets used in the manufacture and distribution of spark plugs and batteries. Electric Autolite then was

one of the largest suppliers of automotive parts, with sales totaling about $220 million (F–1F) and total assets of about $150 million (App. 32, n. 10). In connection with its spark plug and battery operations, it owned a nationally recognized brand name, "Autolite", and had an established nationwide distribution organization.

Thus, Electric Autolite's spark plug and battery assets suited Ford's requirements for successful participation in this aftermarket. As a result, Ford discontinued its studies of entering this field through internal expansion. Instead, by agreement dated April 12, 1961, it contracted with Electric Autolite to purchase the "Autolite" trademark and trade name, Electric Autolite's only spark plug plant in this country (located at Fostoria, Ohio), a battery plant at Owosso, Michigan (one of six owned by Electric Autolite), Electric Autolite's distribution organization for spark plugs, batteries and electrical parts, and the major portion of its spark plug engineering and manufacturing organization (G–1).[4]

The spark plug market, at the time of and for many years prior to the acquisition, was highly concentrated.

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[4] Simultaneously, the parties executed a Purchase Parts Agreement providing, *inter alia*, that (1) Ford would purchase from Electric Autolite a total of 12 million spark plugs over a two year period; (2) Ford would supply Electric Autolite with ceramic insulators (a necessary component of a spark plug) but would not be required to supply more than would be necessary to produce 25 million spark plugs a year; and (3) Ford would purchase from Electric Autolite 45 percent of its total batteries requirements for a 3-year period ending with the 1964 model year (G–2, pp. 1–3).

Three producers accounted for more than 95 percent of all shipments (App. 82; G–161). The General Motors Corporation had entered the spark plug manufacturing field as the result of an acquisition in 1909 (App. 78–79, GF–1, par. 36); it made the "AC" brand and accounted for more than 30 percent of sales. The two other major producers, Electric Autolite and The Champion Spark Plug Company ("Champion)", were independents. For about 20 years prior to the acquisition, Electric Autolite had been Chrysler's sole supplier. It accounted for almost 15 percent of the spark plug market. Champion, which had been Ford's sole supplier for several decades, accounted for about 50 percent of industry sales (App. 79, 82). The remaining 3 to 4 percent was divided among five or six other producers supplying primarily the private-label replacement market (App. 81–82, incl. n. 51; FR–40, p. 2).

In the spark plug aftermarket, there historically has been a strong tendency to replace spark plugs with the same brand installed in the automobile as original equipment—thus giving rise to the so-called original equipment, or "OE", tie. Mechanics dispense most replacement plugs, and usually replace a factory-installed set of plugs with a set of the same brand. The mechanics' fear that serious damage may follow from the failure to use the OE brand is reinforced by promotional literature emphasizing the use of "genuine" parts. The OE tie, though definite (App. 79–80, GF–1, par. 44), is "more psychological than technically necessary" (App. 80), since "all active

brands do appear on a full line for cars of every variety, and normally function well in all cars" (App. 78).

Nevertheless, spark plug makers value highly the OE tie. Thus, to retain Ford as a customer, and the advantages in the aftermarket that follow from this, in 1920 Champion agreed to supply Ford's OE requirements at cost—about six cents a plug. In 1960 Champion still charged Ford only six cents a plug, although its cost had roughly tripled. The two other leading producers adopted the same practice for original equipment customers (App. 79, GF–1, par. 40–41). Plug makers recover their losses on OE sales by profitable sales in the aftermarket, where the requirement of each new vehicle during its lifetime for about five replacements of plug sets generates substantial demand (App. 81).

Following the acquisition, the three leading producers of spark plugs still made more than 95 percent of total industry shipments (G–161). However, two of them, General Motors and Ford, were also automobile manufacturers. Respectively, in 1964 they accounted for almost 40 and 16½ percent of spark plug shipments. The only independent remaining among the leading producers was Champion, whose market share declined from just under 50 percent in 1960 to just under 40 percent in 1964 (G–161). To be sure, Champion attained the Chrysler account after the acquisition. But its deteriorating market position was reflected by its "revolutionary concession" to Chrysler, in which it agreed to furnish, starting in 1964, one-

fourth of Chrysler's original installation requirements under Chrysler's own "MoPar" brand (App. 85). Prior to that, Champion had always sold its OE plugs under its own name, thus obtaining for that name the sole benefit of the OE tie.

After the acquisition Electric Autolite became Eltra Corporation, and in 1962 began manufacturing plugs in a plant in Decatur, Alabama under the name "Prestolite". But having been replaced as Chrysler's supplier by Champion, its share of shipments dropped to 1.2 percent (App. 84–85). Several small private-label manufacturers continued after the acquisition to share the balance of the market (App. 81–82).

2. THE PROCEEDINGS BELOW

A. THE DECISION ON THE MERITS

After an extensive trial,[5] the district court held that the acquisition violated Section 7 of the Clayton Act because its effect may be substantially to lessen competition in the production, sale and distribution of spark plugs and batteries (App. 27–103).[6] Appellant does not contest the judgment with respect to batteries (J.S. 4, 5).

The court found that the acquisition would have two principal adverse effects upon spark plug competition:

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[5] The record before the district court included documentary exhibits occupying more than 3,500 pages and testimony of live witnesses which, together with extracts from depositions, takes about 2,300 pages.

[6] The district court dismissed that portion of the complaint which charged anticompetitive effects with respect to ignition parts and automobiles (App. 103).

(1) It eliminated Ford as a potential entrant into the spark plug market, and the powerful competitive force that this potential exerted on that market (App. 86–88, 95). Champion was Ford's sole supplier prior to the acquisition, and considered its OE status with Ford essential to its position in the replacement market. To protect this status Champion made concessions to Ford, not only on OE sales, but also on sales for redistribution in the replacement market by moderating its profit margins on those sales. This in turn affected the entire aftermarket, since under the Robinson-Patman Act Champion had to charge other aftermarket distributors competing with Ford the same price on replacement plugs as it charged Ford. And because of Champion's strong position among independent aftermarket outlets, its aftermarket prices moderated the prices charged by competing spark plug manufacturers (App. 79, 86–87). "[A]s both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly" (App. 95), Ford's pre-acquisition position served to check "any avarice on the part of Champion" and to "mollify the evils of oligopoly" (App. 88). The acquisition removed Ford as a "safety valve" and left "no similar counterbalance as to Ford * * *" (*ibid.*).

(2) The acquisition also raised significantly the already high barrier to entry into this market (App. 95–98). Through the acquisition Ford became completely integrated as to spark plugs, supplying all of its requirements for original-equipment installation and aftermarket sales. This reduced the total spark plug market by some 10 percent, the amount of Ford's

prior purchases. And this foreclosure was more significant because General Motors, the largest customer, already supplied its own needs; the additional foreclosure took away from existing producers, as well as from potential entrants, "the opportunity to try" to obtain the Ford account (App. 95, 96), thus destroying the "motivation which Ford, even though long a Champion customer, gave other plug makers to work a change which could lead to deconcentration" (App. 97).

The court also referred to the more difficult post-acquisition position of Champion, the only remaining substantial independent. For decades Champion had supplied Ford with below-cost plugs for OE installation, but only under the "Champion" label. After the acquisition, Champion did sell to Chrysler, the only remaining substantial car manufacturer not integrated as to plugs. To do so, however, it had to agree to furnish "one-quarter of Chrysler's assembly requirements under the latter's own 'MoPar' brand, but still at six cents each, and, in effect, to subsidize an attempt to gain a foothold for 'MoPar' with an eye toward eventually stripping 'Champion' of the last vestiges of major new-automobile [OE] status" (App. 85).[7]

[7] The district court was fully aware that internal integration by Ford might have brought about the same anticompetitive result. Such result could not be proscribed under those circumstances, the court noted, not because it was any less anticompetitive, but because Congress had not made it illegal (App. 95).

B. THE DECISION ON RELIEF

Following the parties' failure to negotiate an agreement as to relief, each submitted its own proposal and supporting briefs. Ford proposed (App. 105–106):

> that it be permitted to retain the facilities acquired from the Electric Autolite Company, together with the trade name "Autolite"; that Ford provide Eltra Corporation [the successor to Electric Autolite] with certain machinery to increase its production capacity; and that Ford purchase 30,000,000 spark plugs per year from Eltra for ten years. In this way Ford proposes to raise Eltra's spark-plug-making capacity to about 56,000,000 plugs per year from the present production of 17,000,000 and at the same time provide Eltra with an outlet for the sale of these additional spark plugs. Finally, Ford would be enjoined from acquiring any other spark plug * * * plant for ten years * * *.

The government proposed (App. 105):

> complete divestiture of the assets acquired by Ford * * * [and] that Ford be prohibited from manufacturing spark plugs for ten years and * * * be required to purchase a declining percentage of its spark plug needs from the operator of the divested spark plug factory * * *, which spark plugs are to be labeled "Autolite."

After extensive hearings on relief,[8] the court entered its decree on July 7, 1970 (App. 104–118).

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[8] The record included documentary exhibits exceeding 550 pages and 1100 pages of testimony.

The court did not accept wholly either side's proposal.[9] Noting the practical limitations on a trial judge in prescribing remedies and the need to avoid unnecessary injury, the court "proceeded most carefully and deliberately in determining what relief * * * [to] decree" (App. 106). It pointed out its earlier determination that the acquisition eliminated Ford as a potential entrant, and the moderating influence that this had on Champion and other plug makers, and that it foreclosed Ford as a purchaser, thus raising the barrier to entry in the market (App. 107–108). The relief, it held, "must be designed to eradicate the tendencies of the acquisition to substantially lessen competition in the context of the present market and economic conditions" (App. 108). It concluded that "the only remedy that will effectively correct the situation is that of divestiture," since "[i]n no other way can the foreclosure of Ford" and the elimination "*of Ford's pre-1961 impact* on the actions of Champion and the other major manufacturers" be overcome (App. 112).[10]

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[9] As the court explained (App. 106): "It is difficult to conceive of proposals for relief that are farther apart and that share less common ground."

[10] In deciding what remedy was required, the court took into account "that forces are now at work within the spark plug market that may well lead to its eventual deconcentration by increasing the number of potential customers for a new entrant into the plug manufacturing business and reducing the need for original equipment identification" (App. 114). Mass merchandisers are beginning to enter the field, selling all makes of plugs as well as promoting their own private brands. Additional oil companies are expected to join Standard Oil Company as private label users. Ford's continued ownership of

Finally, the court concluded "that certain injunctive provisions are required in order that divestiture may be made effective and to give * * * [the divested plant] an opportunity to establish its competitive position" (App. 114). It enjoined Ford for ten years from manufacturing spark plugs (App. 115, 121), ordered Ford for five years to purchase one-half of its total annual requirements of spark plugs from the divested plant under the "Autolite" name (App. 115, 121–122), and prohibited Ford for ten years from selling plugs to its dealers at less than the prevailing jobbers' selling price in order to preserve, insofar as possible and practicable, the divested plant's existing distribution system (App. 115–116, 122).[11]

ARGUMENT

This case presents no substantial issue warranting plenary consideration by this Court. The district court held that the acquisition by Ford, the second largest

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Electric Autolite's spark plug assets, the court concluded "restrained [these forces] more than they would otherwise be" (*ibid.*). This is due in large measure to the fact that "[i]t is in the self-interest of the OE plug manufacturers [such as Ford, after the acquisition] to discourage private brand sales and to strengthen the OE tie" (*ibid.*). Thus, "[t]o the extent that the spark [plug] manufacturers are not owned by the auto makers, it seems clear that they will be more favorably disposed toward private brand sales and will compete more vigorously for such sales" (*ibid.*).

[11] The court also sought through its injunctive provisions to protect the employees of the Fostoria plant by ordering Ford to condition its divestiture sale on the purchaser assuming the existing collective bargaining contract, and to offer employment to any employees displaced by a transfer from the divested plant of non-plug operations (App. 116, 122–123).

automobile manufacturer, of the assets of Electric Autolite, the second ranking independent producer of spark plugs, violated Section 7 of the Clayton Act. The acquisition, the court found, eliminated the moderating effect upon competition resulting from Ford's presence on the edge of the market, and raised the barrier to entry into the market by foreclosing Ford as a spark plug purchaser. The probable effect of these changes was the statutorily-proscribed one—substantially to lessen competition in the pertinent line of commerce, the manufacture and sale of spark plugs. These conclusions were reached through proper application of well-settled principles to findings of fact solidly grounded in the evidence.

The court fashioned its relief order after a thorough and sensitive exploration of the competing interests involved and of each side's proposal. By its decree, the court sought only to redress the violation. The remedies ordered are within the broad range of the trial court's allowable discretion. The challenge to the court's choices, here as well as in the court below, is based largely on a reargument of Ford's contentions on the merits.

1. It is well settled that the effect of an acquisition which removes from a market a firm whose presence on the edge of that market has been a significant incentive to competition may be substantially to lessen competition, in violation of Section 7. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–581; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174; *United States* v. *El Paso Natural*

Gas Co., 376 U.S. 651, 658–661. Appellant does not challenge this principle, but instead asserts that there is no factual support for the court's finding that before the acquisition Ford's position as a potential competitor had a moderating effect on the pertinent market (J.S. 11–13).

To the contrary, the court's finding is solidly grounded. Ford was Champion's largest customer, and as such exerted substantial pressures on Champion to compete vigorously for its business. One of Ford's senior officers testified that Champion would have attempted to dissuade Ford from integrating with respect to its spark plug needs: "[T]hey [Champion] could deal with the price and terms of their replacement spark plug" (Tr. 2004). Champion's vice-president verified this; he testified that over the years Champion had heard "whisperings here and there" of the possibility that Ford might integrate this line, and that Champion could retain this business by giving Ford a good product "at a price that was satisfactory to them * * *" (Tr. 717). As the court below concluded, Ford's "potential plainly had a bearing on what it paid" for replacement plugs (App. 87).[12]

This influence carried over into the entire aftermarket. Because Champion was subject to a Federal Trade Commission cease-and-desist order under the Robinson-Patman Act, it had to offer Ford's competitors in the replacement market—the independent

[12] Ford's leverage was also reflected by the efforts of other spark plug suppliers, both domestic and foreign, to secure its business (Tr. 2173, 2240; App. 96).

warehouse distributors—the same price advantage it accorded Ford (App. 87). Thus Ford's presence "moderated all of Champion's replacement-sales policies directly * * *" (App. 86). And in turn Champion's policies strongly influenced other spark plug manufacturers and suppliers, because of its control of half the aftermarket (App. 80) and the oligopolistic structure of the market (App. 86).

Ford's challenges to the court's findings are unpersuasive. It argues first that at the time of the acquisition Ford was not about to integrate this line through internal expansion, and that therefore it was not a "likely entrant" into the market (J.S. 12). But the important fact is that Ford was there as a *potential* entrant, and it was Ford's presence "at the edge of the market" that had a substantial influence on the competitive behavior of the current producers. See *United States* v. *Penn-Olin Chemical Co., supra*, 378 U.S. at 173. And it was on this ground that the court properly based its finding of illegality (App. 95):

> An interested firm on the outside has a twofold significance. It may someday go in and set the stage for noticeable deconcentration. While it merely stays near the edge, it is a deterrent to current competitors. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). This was Ford uniquely, as both a prime candidate to manufacture and the major customer of the dominant member of the oligopoly.[12]

[12] Indeed, Ford admitted that it was a "potential *de novo* spark-plug producer in the late 1950s" (App. 85).

Ford's second complaint is that Electric Autolite was "not dominant" as a spark plug manufacturer (J.S. 12). This simply is not determinative of whether the elimination of Ford's impact on the replacement market resulted in a substantial lessening of competition in violation of the statute. The combination of Ford with Electric Autolite posed a significant threat to the competitive structure of the spark plug market. See *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 163–164.

Ford's claim that spark plugs are "not fungible" (J.S. 12) is likewise inapposite. As noted above (pp. 6–7, *supra*), the OE preference is less a function of engineering necessity than of lack of information in an uncompetitive market. "[A]ll active brands do appear on a full line of cars of every variety, and normally function well in all cars" (App. 78). Indeed, appellant's own evidence on relief showed that mass merchandisers buy from a single producer and carry only private label brands for servicing *all* makes of cars (FR 40, FRC 44; App. 81, 113–114), thus recognizing that spark plugs are essentially interchangeable.

Finally, the acquisition, if otherwise proscribed, cannot be justified by showing that it makes Ford a more effective competitor against General Motors and Champion (J.S. 10–11, 14). See *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 370–371; *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 615–618 (S.D. N.Y.). Moreover, this justification, if allowed here, would have the highly undesirable result

of "transmitting the rigidity of the oligopolistic structure of the automobile industry to the spark plug industry, thus reducing the chances of future deconcentration of the spark plug market by forces at work within that market" (App. 108).[14]

2. The anticompetitive effects of foreclosure were explained by this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323–324:[15]

> The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition" * * * which "deprive[s] * * * rivals of a fair opportunity to compete." * * * Every extended vertical arrangement by its very nature, for at least a

[14] Appellant also charges the court with disregarding what it characterizes as "developments favorable to competition" (J.S. 11). Even assuming the relevance of the factors to which appellant refers, the court considered them at length (see, *e.g.*, App. 85–88, 93–95, 96). Appellant points to the fact that Eltra "has progressively increased its market share with the growth in the private label market" (J.S. 11), but overlooks the fact that much, if not all, of this growth resulted from Eltra's recent acquisition of another spark plug manufacturer, General Battery and Ceramic Corporation (see J.S. 6, n.*).

[15] See also *United States* v. *du Pont*, 353 U.S. 586; *United States Steel Corp.* v. *Federal Trade Commission*, 426 F. 2d 592, 598–605 (C.A. 6); *United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Calif.); *United States* v. *Standard Oil Co.* (N.J.), 253 F. Supp. 196, 224–227 (D. N.J.); *United States* v. *Aluminum Co. of America*, 233 F. Supp. 718 (E.D. Mo.), 247 F. Supp. 308 (E.D. Mo.), affirmed *per curiam*, 382 U.S. 12; *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 102–105 (S.D.N.Y.), affirmed *per curiam*, 381 U.S. 414.

> time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement. * * * [citations and footnotes omitted.]

The court below held that the foreclosure of Ford as a purchaser of spark plugs "seems to be a blatant Clayton Act violation according to the teaching of *Brown Shoe Co.* v. *United States, supra,* in particular when seen against the background of the exclusion at General Motors * * *" (App. 95–96). The acquisition eliminated Ford as a purchaser of spark plugs, whereas previously it had purchased almost 10 percent of the total industry output. That percentage, though plainly substantial even on its own, does not reflect the full extent of the anticompetitive effect. General Motors, the manufacturer of about 50 percent of all automobiles, supplies internally all of its own original equipment spark plug needs. Ford's share of the automobile market is approximately 30 percent, and the acquisition removed this additional source of original equipment spark plug business. As a result, only about 20 percent of the original equipment market remains potentially available to independent producers.

The practical effect of the acquisition, therefore, is to foreclose approximately 60 percent of the available OE market. The foreclosure extended into the aftermarket, because the OE tie, reinforced by the promotional literature of the automobile manufacturers, still has a substantial impact on that market. Thus, any would-be entrant no longer has the prospect of obtaining the Ford account, and the competitive in-

centives that this provided, both for existing competitors and for potential entrants, have been destroyed. These facts fully support the court's determination that the acquisition resulted in a foreclosure which independently was a violation of the statute. Cf. *Standard Oil Co.* v. *United States,* 337 U.S. 293, 314.

Appellant disparages the importance the court below attached to the acquisition's elimination of an "opportunity to try" to get Ford's business (J.S. 15). Its position is that, practically speaking, Ford's business was already foreclosed because of its long-standing arrangement with Champion. But Champion had no assurance that it would continue to obtain Ford's business. Champion's vice-president testified that it had to be wary of competition because it had just a year-to-year contract (Tr. 694–695). The important fact is that Champion's only tie to Ford was that contract; the "more permanent and irreversible tie" arising from ownership integration did not exist until the acquisition. *Brown Shoe Co,* v. *United States, supra,* 370 U.S. at 332, n. 55. So long as Ford's arrangements were only contractual, the "opportunity to try" was hardly "theoretical" (J.S. 16). Electric Autolite tried repeatedly to obtain Ford's business (Tr. 695), as did General Battery and Ceramic (Tr. 2173). Ford even made contacts in Germany concerning its spark plug business (Tr. 2239–2240; App. 96).

Ford's acquisition changed all this. The result was "the destruction of the motivation which Ford, even though long a Champion customer, gave other plug makers to work a change which could lead to decon-

centration" (App. 97). Moreover, the prospect of selling to Ford thus destroyed was "one of the few discernible ways in which such a change could be brought about" (*ibid.*). In these circumstances, the court below properly found that the foreclosure of the Ford market resulting from the acquisition violated the statute. Where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Philadelphia Nat'l Bank, supra,* 374 U.S. at 365, n. 42. Accord: *United States* v. *Continental Can Co.,* 378 U.S. 441, 461–462; *United States* v. *Alcoa,* 377 U.S. 271, 279–280.

3. Once it is established that a Section 7 violation has occurred, the choice of a remedy to redress that violation is for the trial court. "The District Courts, in the framing of equitable decrees [to eliminate the effects of the unlawful acquisition], are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States,* 332 U.S. 392, 400–401." *United States* v. *du Pont & Co.,* 353 U.S. 586, 607–608. See also *United States* v. *du Pont & Co.,* 366 U.S. 316, 322. Particular deference is owed to the district judge's selection of the measures appropriate to eliminate the violation where, as here, he initially found the violation. See *United States* v. *du Pont & Co., supra,* 366 U.S. at 322, n. 3; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 185.

In this case the district judge, who had earlier presided at the lengthy trial on the merits and determined that a violation had occurred, then conducted a thorough hearing concerning what remedies should be ordered. The parties could not agree on this issue, and hence submitted sharply conflicting proposals (App. 105–106). The judge accepted neither proposal. Instead, he sought essentially to restore the *status quo ante*, and fashioned remedies designed to achieve this end.

Before the acquisition, Ford was not a manufacturer of spark plugs. Instead, it was the largest single purchaser of plugs, and bought its needs from an independent producer, Champion, under the Champion label. As the industry's largest single purchaser, Ford exerted positive competitive pressures on Champion, as well as on existing and potential producers who might hope to displace Champion as Ford's supplier. In the plug industry itself, only General Motors, among the automobile companies, also manufactured its own spark plugs; two independent producers, Champion and Electric Autolite, supplied original equipment plugs to the other automobile companies, and the other independent plug producers generally sold private brands.

The decree undertakes to restore this situation as nearly as possible. It eliminates for a limited period the acquisition's addition to the plug industry of another automobile company as a producer, and reestablishes Ford as a purchaser. Thus all spark plug producers, actual and potential, again have the "op-

portunity to try" to sell Ford. As a purchaser, rather than an integrated producer, Ford will again be a significant, and beneficial, influence on the competitive behavior of plug suppliers.

Moreover, the divestiture, contrary to appellant's suggestion (J.S. 17), will exert positive pressures on the plug market from the outset. The divested plant will do so in an effort to supply Ford's immediate requirements above the level (50 percent) guaranteed it during the initial 5-year period, and to retain Ford's business thereafter. Of course other producers may and can be expected to compete for this same business. Finally, all producers will have the incentive of Ford's returning to the status of a purchaser, with the possibility that their actions during the decree period may convince Ford to remain a purchaser after this time and to buy from them.[16]

[16] Appellant's complaint regarding the court's 10-year freeze on internal expansion (J.S. 20–21) is exaggerated. The court's judgment that the benefits to competition as a result of the ban far outweighed the drawbacks is entirely reasonable.

Actually, Ford's position after divestiture would not be too different from its pre-acquisition posture. Its own witness testified that it was not on the verge of entering the plug market and that, as the court below noted (App. 91), a period of about 5 to 8 years after a plant is built is necessary to penetrate the replacement market. Within 5 years after divestiture, Ford will be free to use its own brand on OE plugs, thus laying the ground work for a significant penetration of the replacement market within 5 to 8 years thereafter. This combined period is not significantly different from the total time it would have taken Ford to build a plant and to penetrate the replacement market by internal expansion, rather than by way of the prohibited acquisition.

The relief fashioned by the court will have the further benefit of adding a new, aggressive competitor to the plug market. The divested plant will be assured of a foothold in the lucrative aftermarket, based on the wide acceptance of the "Autolite" name and, at least during the initial five-year period, its OE status on Ford vehicles. At the same time, this new enterprise will know that its survival may depend upon its ability to compete in the aftermarket without OE status, and thus it will have a strong incentive to compete aggressively for aftermarket sales on the basis of price, a factor which, unhappily, plays almost no role presently at the manufacturing level (App. 112).

Ford's proposal simply was not a reasonable one. Its acquired producer status is fundamentally at odds with its pre-acquisition status as a buyer, whose needs competing producers might aspire to supply and whose potential entry into the market served to check anticompetitive actions by those producers. If Ford now were permitted to stay in the market as a producer, as it wants, the benefits derived from its pre-acquisition position as a prospective major purchaser would be lost.

Appellant's attack on the decree primarily reflects its disagreement with the court's holding that the acquisition violated the Clayton Act. It contends, in substance, that competition would be better served if it retained its acquired place in the spark plug market,

along with the plant and the "Autolite" name,[17] than under the court's remedy, which excludes Ford from production and encourages the development of the divested plant as a viable competitor[18] (J.S. 17). The issue here, however, is not whether the acquisition was procompetitive so that Ford should be allowed to retain the acquired properties, but whether, in view of the violation found, the choice of remedy made by the

[17] Ford's actions since the acquisition—its "difficult uphill battle" to "gain [in] ground" against General Motors and Champion (J.S. 17)—have been of dubious benefit to the consumer. There has been no active aftermarket price competition since the acquisition. Instead, the price of "Autolite" spark plugs is virtually identical to that of the Champion and General Motors' "AC" brands (FR–13, App. 112). The increase in Ford's share of the market reflects no increase in meaningful competition, but rather a mere rearrangement of market shares among the three dominant spark plug firms. The anticompetitive effects since the acquisition, on the other hand, are clear—the barrier to new entry has increased, the OE tie has been strengthened, and price competition at the manufacturing level has diminished.

[18] Appellant questions whether the divested plant can survive against "the two industry giants" (J.S. 17–19). In support of this contention, appellant asserts that the divested plant will not have the benefit of Ford's present aftermarket sales, and that without this, purchases from the plant will not be sufficient to sustain it (J.S. 18). But the decree does not require Ford to abandon its sales in the aftermarket. It may wish to retain its present system for distribution of "Autolite" plugs through independent warehouses; if it does so, its 19 percent aftermarket share (J.S. 17) will require a volume of production far more than enough to sustain the divested plant. If, on the other hand, Ford discontinues the sale of "Autolite" plugs through its warehouse distributors, the divested plant can be expected to obtain these outlets to satisfy the aftermarket demand for "Autolite" plugs.

court is so unreasonable as to constitute an abuse of discretion. That is not the case.

While future market structure following a court-ordered divestiture can never be predicted with absolute certainty, the decree in this case reflects a sound economic analysis grounded on a mature understanding of industry facts. It offers a reasonable prospect for restoring, and indeed for invigorating, the competition adversely affected by the acquisition, and accordingly should be upheld. See *United States* v. *du Pont, supra,* 366 U.S. at 334.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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